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Towards a Bill of Rights For a Democratic South Africa†

by ALBIE SACHS

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Professor Sachs holds the degrees of B.A. and L.L.B. from the University of Cape Town and Ph.D. from the University of Sussex. His published works include the Jail Diary of Albie Sachs (dramatized by the Royal Shakespeare Company and performed in Britain, the United States and many other countries); Justice in South Africa, an historical legal analysis of the functioning of the judiciary in a racially stratified society, published by the University of California Press; and Island in Chains, written with Indres Naidoo, who was imprisoned for ten years on Robben Island. Island in Chains was awarded the Martin Luther King Memorial Prize. Professor Sachs has contributed towards the Modern Law Review, the International Journal of the Sociology of Law, and other scholarly journals.

I. INTRODUCTION

All revolutions are impossible until they happen; then they become inevitable. South Africa is trembling between the impossible and the inevitable, and it is in this brilliantly unstable situation that the question of

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human rights and the basics of government in a post-apartheid society demands attention.

No longer is it necessary to spend much time analyzing schemes to modernize, reform, liberalize or democratize apartheid. Like slavery and colonialism, apartheid is regarded as irremediably bad. There cannot be good apartheid, or degrees of acceptable apartheid. The only questions are how to end the system as rapidly as possible and how to ensure that the new society which replaces it lives up to the ideals of the South African people and the world community. More specifically, at the constitutional level, the issue is no longer whether to have democracy and equal rights, but how fully to achieve these principles and how to ensure that within the overall democratic scheme, the cultural diversity of the country is accommodated and the individual rights of citizens are respected.

II. FIVE CONSTITUTIONAL SCHEMES

Proposals for new constitutional dispensations are being made on almost a monthly basis. The air is thick with a specially invented or adapted vocabulary: confederation, federation, consociation, tricameral, three-tier, and own-affairs. One needs to be like those animals with swivel eyes that can see backwards as well as forwards at the same time, upwards and downwards too. Behind the multiplicity of commission reports and proposals, however, it is possible to discern a number of major positions. For the sake of convenience, and bearing in mind that the categories shade into each other, five basic constitutional schemes may be distinguished. They can be summarized as follows:

- (i) Open apartheid;
- (ii) Reformed apartheid;
- (iii) Multi-racial apartheid;
- (iv) Hidden or democratic apartheid; and
- (v) Anti-apartheid (non-racial democracy).

The terminology is, of course, not that of the authors of the proposals since most of them insist that their schemes will end rather than perpetuate apartheid. But what the first four proposals have in common is that they are all based on a desire to preserve a constitutionally privileged position for the white minority. Furthermore, all four proposals either directly or indirectly make the distribution of power and wealth depend on the criterion of race.

A. Open Apartheid

The basic constitutional tenets of open apartheid are well known.

They presuppose separate sovereignties for whites and blacks with no constitutional mixing at any level. Whites have exclusive control over so-called white South Africa, that is, eighty-seven percent of the surface area of the country, including all the developed zones. Blacks become independent in their so-called tribal homelands. Even blacks living in the so-called white areas are to exercise their rights through the Bantustans to which they are attached by descent and language. Ethnicity is given a territorial base and is made the exclusive constitutional principle. Relations between black and white become relations of international law, not of constitutional law.

B. Reformed Apartheid

Reformed apartheid makes race the dominant but not the exclusive principle of the constitution. It bases political rights on race but recognizes that some sort of political inter-relationship involving all ethnic groups is necessary. The term most frequently used is confederation. Essentially it presupposed links between the white-dominated central Parliament and the Bantustans. To complete the picture, South Africans of mixed or Indian descent (almost completely ignored in the open apartheid scheme) were to be junior partners in the tricameral Parliament, and so-called urban blacks were to have a series of councils, starting at the community level and moving upwards, to represent their interests. Apartheid would remain intact in that all organs of legislative power would continue to be established on separate ethnic bases, and that each one would have exclusive control over what is defined as "own affairs." The element of reform would be contained in a provision that "common affairs" would be dealt with at a high level on the basis of meetings between representatives of the different groups in some form of confederal council. Since everybody would have the vote at some level or other, it would be claimed that the principle of universal suffrage was being recognized. At the same time, overtly discriminatory laws would be gradually reduced. A fundamental feature of this scheme is that through dividing the black population, through regulating numbers at crucial levels, through the definition of own affairs and common or general affairs, and through the control of funds and control of the state apparatus, including the army and police force, the white minority and specifically the Nationalist Party would maintain control over the country. This would be a form of limited power-sharing under the clear hegemony of the leading party in the white Chamber of the tri-cameral Parliament. The dominant role of the Nationalist Party is evident from a reading of the constitutional documents themselves.

C. Multi-racial Apartheid

In essence multi-racial apartheid is based on the politics of inter-ethnic alliance rather than inter-ethnic consultation. The Bantustans retain some importance but are not projected as the sole structures through which Africans can exercise political rights. Rather, they are gradually integrated as component parts of regional political structures, retaining some autonomy, but sharing certain powers on a regional basis with the people living in the so-called multi-racial areas.

The foundation of this approach lies in the Report of the Commission which Chief Gatsha Buthelezi set up some years back to inquire into the future of the province of Natal. More recently, it has evolved into the so-called Kwa-Zulu Indaba proposals. The region is projected as the embryo unit of a future federal state. Regions may have differences in their political structures and advance at different rates. The federal government is gradually structured on the basis of interaction between the leaders of the regions. The way is left open for a black Head of State, who by virtue of his own election to office will declare that apartheid is dead and buried. What are referred to as legitimate white fears are constitutionally catered for by means of a combination of territorial divisions, own affairs concepts, racial quotas in government, group vetoes for minorities, and entrenched group and individual rights. Behind all these devices are two fundamental principles: there shall be no majority rule and there shall be no rapid moves to end the inequalities produced by apartheid.

D. Hidden or Democratic Apartheid

Hidden or democratic apartheid starts off on the democratic assumption, however reluctant, that there must be universal suffrage in a unitary state. It accepts the hypothesis that the African National Congress (ANC) would probably be the ruling party in the new society—ours being the only revolution to be accompanied by opinion polls, there could be no doubt as to who would win if free elections were to be held. Where the apartheid aspect would live on buried in the heart of the new democratic constitution would be in entrenched clauses which will be insisted upon as the condition for the acceptance of the principle of one person, one vote. Such clauses would impose a double brake on the dismantling of apartheid; they would restrict the competence of Parliament, and they would institutionalize conservative and white-dominated machinery to guarantee that such competence is not exceeded; they would abolish *de jure* apartheid but constitutionally freeze the existing *de*

facto apartheid whereby eighty-seven percent of the land and ninety-five percent of the country's productive capacity belongs to the whites.

E. Non-racial Democracy

Non-racial democracy presupposes a united South Africa governed by the principles of universal suffrage, majority rule and equal individual rights. The Freedom Charter, adopted by the Congress of the People in 1955, sets out a clear program born out of the South African reality which could serve as the fundamental document around which a new Constitution could be developed. But within the basic framework of the Freedom Charter, and with a view to making its principles the property of all the South African people, there would be many issues which could be discussed: the internal structure of the government, whether to have a Presidential or Prime Ministerial form of leadership, what the official languages should be, and where the country's capital should be situated. Perhaps more important negotiations could play a key role in assisting the transfer of power from a racial minority to the people as a whole. Once the principle is accepted that apartheid is to be completely dismantled, and once it is agreed that the only effective and lasting way to dismantle it is to establish a non-racial, democratic society in a united country, the issue of how to proceed most rapidly to the materialization of this solution comes to be placed squarely on the agenda.

III. A BILL OF RIGHTS FOR A POST-APARTHEID SOUTH AFRICA: SOME MISCONCEPTIONS

Two views on a Bill of Rights argue in summary that either, A Bill of Rights is necessary because if you grant the legitimate rights of the black majority you must also give reasonable protection to the rights of the white minority.

or,

A Bill of Rights is a reactionary device designed to preserve the interests of the whites and to prevent any effective redistribution of wealth and power in South Africa.

The most curious feature about the demand for a Bill of Rights in South Africa is that it comes not from the ranks of the oppressed but from a certain stratum in the ranks of the oppressors. This has had the effect of turning the debate on a Bill of Rights inside out. Instead of a Bill of Rights being associated with democratic advance, it is seen as a brake on such advance; instead of being welcomed by the mass of the population as an instrument of liberation, it is viewed by the majority

with almost total suspicion. Indeed, South Africa must be the only country in the world in which sections of the oppressed people have actually constituted an anti-Bill of Rights Committee.

At first sight, nothing would appear simpler than to adopt a Bill of Rights based upon a universally accepted document such as the United Nations Universal Declaration of Human Rights. The fact is that the apartheid divide lies as heavily on the Bill of Rights debate as it does on any other important topic in South Africa. Disagreement relates not only to the specific clauses to be included or excluded, but to the whole thrust of a possible Bill, to the manner in which it should be created, and to the means whereby it should be enforced.

A. Suspicions about a Bill of Rights

It is a sad tribute to the way the law has impinged on the life of the majority of South Africans that a Bill of Rights is seen essentially as a means of using juridical techniques to restrict rather than enlarge the area of human freedom. Suspicion is founded on a variety of interconnected factors:

- (i) The push for a Bill of Rights comes not from the heart of the freedom struggle, but from people on the fringes, many of whom have criticized apartheid, but few of whom have been actively involved in the struggle against it;
- (ii) The objective of the Bill of Rights is seen as being primarily to protect the existing and unjustly acquired rights of the racist minority rather than to advance the legitimate claims of the oppressed majority;
- (iii) The attack on majoritarianism, which underlies many arguments in favor of a Bill of Rights, is manifestly racist, since South Africa has been governed without a Bill of Rights and in accordance with the principles of majority rule (for the minority!) since the Union of South Africa was created in 1910. It is only now that the majority promises to be black, that constitutional doubts and the need for checks and balances suddenly become allegedly self-evident;
- (iv) The key role given to what are called experienced lawyers in controlling the implementation of the proposed Bill of Rights would mean inevitably an interpretation in favour of the existing and unjustly acquired rights and against any meaningful re-allocation of rights; and
- (v) While protection of the individual is necessary, the failure of the proposed Bill of Rights to address the question of grossly disadvan-

taged communities renders it largely irrelevant to the human rights needs of the country.

Such suspicions might seem shockingly unjust to proponents of a Bill of Rights, many of whom have both a genuine hatred of apartheid and deeply sincere desire to see as rapid and peaceful a transformation of the country as possible. Yet the proponents of a Bill of Rights have rushed ahead with their drafts without paying due attention to questions to which their lawyerly background should have made them more sensitive. The dismal experience of the Ciskei, one of the most violently repressive parts of South Africa in which murder and torture stalk the people daily despite the existence of an "independent judiciary" interpreting a beautifully phrased 'Bill of Rights' (in a so-called Independence Constitution), should have alerted them. Before drafting a Bill of Rights for a post-apartheid South Africa, it is necessary to ask certain preliminary questions, the answers to which will decisively affect the final result. More specifically, it is necessary to ask simply:

What Bill of Rights?

By whom and for whom?

How?

B. Misconceptions about the Content of a Bill of Rights—The Question of the Three Generations of Rights

Most proponents of a Bill of Rights for South Africa operate within a thematically limited and historically out of date perspective. Very few get beyond what has been called the First Generation of human rights, namely, civil and political rights and rights of due process, as were declared during the great anti-feudal and anti-colonial revolutions of the eighteenth century. The Second Generation of Rights, namely those of a social, economic, and cultural nature enunciated in the United Nations Charter of Human Rights of the 1960s, get scant mention; while the Third Generation of Rights, the rights to development, peace, social identity, and a clean environment, which have been clearly identified as human and people's rights only in the past decade, get virtually no attention at all. At a time when every possible intellectual input is needed, it is perverse indeed to restrict the scope of the debate to First Generation Rights only, just as it would be grossly anachronistic to start post-apartheid South Africa with a Bill of Rights document as archaic (even if not as vicious) as the system it is designed to eliminate.

The great majority of South Africans have in reality never enjoyed either First, Second or Third Generation Rights. Their franchise rights

have been restricted or non-existent, so the achievement of First Generation Rights is fundamental to the establishment of democracy and the overcoming of national oppression. But for the vote to have meaning, for the rule of law to have content, the vote must be the instrument for the achievement of Second and Third Generation Rights. It would be a sad victory if the people had the right every five or so years to emerge from their forced-removal hovels and second-rate Group Area homesteads to go to the polls, only thereafter to return to their inferior houses, inferior education, and inferior jobs. Indeed it would be a strange panoply of rights that not only ignored but excluded the rights to peace and development, the rights to enjoy the beauty of and benefit from the natural resources of the country, and above all, the right to be a people, to be South African in the full sense of the word, to constitute a nation, to overcome the divisions and inferiorization imposed by racism, tribalism and regionalism, and to participate as a people in the life of the community of nations.

There are some persons who would wish to restrict the extension of rights to the First Generation only, granting formal political power but depriving it of practical content; the people can have the vote, but not homes and jobs. There are others who would see the extension of Second Generation socio-economic rights as an alternative to First Generation political rights; the people can have homes and jobs, but not the vote. Very few look at the Third Generation at all, the rights so important to a people denied peace, security, dignity, and an identity for centuries.

The fundamental constitutional problem, however, is not to set one Generation of Rights against another, but to harmonize all three. The possessors of the rights are the same physical human beings, namely, the citizens of a democratic South Africa. They do not exercise one set of rights in the morning, another in the afternoon, and a third at night. The web of rights is unbroken in fabric, simultaneous in operation, and all-extensive in character. In the world at large, the Generations of Rights, or rather, of Rights formulations, succeeded each other at different times, but their sphere and object was essentially the same and their line of development has been continuous. It would be absurd for us in South Africa to have to recapitulate and live through each stage separately before advancing to the next. We do not need to reinvent each formulation. Rather, we draw on the achievements of the struggles of other peoples and benefit from the intellectual creation of the world community to find formulae and solutions to our own problems. Thus, when the majority in South Africa look to the complete elimination of apartheid in all its shapes and forms, what they are longing for is the progressive, rapid, and

simultaneous achievement of all the rights as formulated in all three Generations. The people of South Africa want to be free, to live decent lives, to be a community with their own personality and culture, and to live in peace and with dignity with each other and the world, no more, no less.

C. A Bill of Rights: By Whom and for Whom?

A look at the historical contexts in which other Bills of Rights have been adopted shows the back-to-front nature of the proposed Bill of Rights for South Africa. The Magna Carta, the Bill of Rights adopted in England in the seventeenth century, the United States Bill of Rights, and the French Declaration of the Rights of Man, were all formulated and adopted by the former victims of arbitrariness and oppression as a means of controlling or excluding the power of the former oppressors and guaranteeing the aggrieved classes freedom from future revivals of arbitrary behavior. It was not Hitler or his former supporters who drafted the United Nations Declaration of Human Rights or the subsequent Charter, but rather the survivors of the Hitlerite pillage and massacre, supported by a shocked world.

If we take a close look at the great prototype Bill of Rights, namely that contained in the early amendments to the United States Constitution, we see that it was adopted not before independence, but afterwards, not by the ousted colonial authorities but by the victorious freedom-fighters. We observe too that the objective of the amendments was not to preserve the rights of the defeated loyalists, but rather to root out once and for all the kinds of oppressive behavior indulged in by supporters of the Crown. Thus, each of the amendments was designed to deal with a specific form of denial of rights: no freedom of speech or assembly, the imposition of an official church, the use of torture and cruel punishments, the forcing of confessions, and so on. The Bill was not an abstractly conceived set of rights designed by lawyers in terms of general, pre-conceived notions, but a concrete set of responses to specifically felt forms of domination. The former colonized people, victims of despotism, anxious to guarantee that there be no revival of the suffering to which they had been subjected and to consolidate their new-found freedom, remembered exactly where the shoe had pinched, and designed their Bill of Rights to respond accordingly.

Applied to South Africa, this would mean essentially that the Bill of Rights would be adopted at the behest of the former oppressed, after freedom had been won, and as a means of ensuring that their oppression was not restored in old or new forms. The Bill of Rights would confront

and outlaw all the specific forms of oppression associated with apartheid: the whole system of racial domination, the pass laws, legally enforced removals, the Group Areas legislation, and the violence of the troops in the townships and the security police in the cells. Since the equivalent of independence in South African conditions is the restoration of the land, of dignity, and rights within the existing boundaries of the country, a Bill of Rights would have to address itself directly to the question of equal access to resources. In other words, a genuine document in the classic Bill of Rights tradition would have as its principal objective the total elimination of apartheid and the guaranteeing of rights to those presently oppressed.

In the proposals being made we find almost exactly the opposite being expressed. The principal objective is precisely to give guarantees to the present oppressors, to protect them against the revindications of the oppressed; to do so in advance of and as an alternative to rather than as a guarantee of democracy, to act as a bulwark against rather than as a prescription in favor of change. Such a Bill of Rights would be deprived of its true function. Instead of being an instrument designed to protect the future rights of the whole population, it becomes a means of defending the present privileges of the minority, surpassing the legitimate bounds of legal irony by making a Bill of Rights that perpetuates injustice in the name of constitutionality. It is only necessary to refer to a concrete example to see the significance of this issue.

If one looks at the question of the land, one sees the contradiction immediately. In the past three decades, more than three million South Africans have been forcibly removed from their homes and farms, simply because they were black. Apartheid law then conferred legal title on owners whose main merit was that of having a white skin. Whom would the proposed Bill of Rights protect: the victims of this unjust conduct, which has been condemned by all mankind as a crime against humanity, or the beneficiaries? Although oppression and poverty are not necessarily completely synonymous, they do tend to go hand in hand. Where would the people, condemned as squatters after living on land for generations, their homes bulldozed into the ground, get the finance to compensate the new owners with their legal "titles," when the only collateral the dispossessed would have, has no known market value, namely, centuries of suffering and dispossession?

Looking at the surface area of South Africa as a whole, one finds that at present the dominant minority of less than twenty percent of the population has reserved to them by law nearly ninety percent of the land. It would be a strange Bill of Rights that said in effect that the remaining

eighty percent of the population had to forego their right to own and farm land because to exercise such a right, would be to violate the acquired apartheid rights of the twenty percent. Looked at from the perspective of human rights, who has the greater claim to land, the original owners and workers of the land, expelled by guns, torches, and bulldozers from the soil, turned into migrant workers, perpetually on the move with no plot they can call their own; or the present owners, frequently absentee, whose rights are based on titles conferred in terms of the so-called Native Lands Act and the Group Areas Act?

This is not to say that there are no white farmers with a deep attachment to and love of the land, who in the future would have no role to play in the growing of the food the country needs. Nor is it to argue that the past humiliation of the oppressed can only be assuaged by the future humiliation of the oppressors. One of the main functions of a new constitution would be to guarantee conditions in which all citizens, independently of race, color or creed could make their contribution to society and live in dignity and peace. But it is to insist that there be no *de facto* constitutional freezing of the present unjust and racially enforced distribution of land. There might be good arguments for the careful study of transition arrangements, for giving the present owners alternatives to sabotage and fighting to the death, for taking care to maintain high levels of food production while new generations of agricultural scientists are being trained, and for creating the conditions in which a common patriotism involving all South Africans is allowed to evolve. But these are essentially pragmatic factors that belong to the political arena. They are not inalienable human rights principles that belong to a Bill of Rights.

The question in relation to the great tracts of land owned by the whites, while millions of black would-be farmers have no rights to land whatsoever, is how to create legal interests that eliminate what has been the foundation of the whole system of cheap, migrant labor; of pass laws, compounds and locations; and of the denial of citizenship rights. Furthermore, how to do this in a way that encourages a reduction rather than an intensification of racial antagonism and a minimization of damage to the country's food supply.

From a human rights point of view, the starting point of constitutional affirmation in a post-apartheid democratic South Africa is that the country belongs to all who live in it, not just to a small racial minority. If the development of human rights is the criterion, there must be a constitutional requirement that the land be redistributed in a fair and just way, not a requirement that says there can be no redistribution except on conditions that are clearly unattainable by the black majority.

D. Misconceptions about Structure and Implementation—The Question of Affirmative Action

Since most proponents of a Bill of Rights in South Africa see it as an instrument designed to block rather than promote any significant social change, they completely omit from their projections any reference to affirmative action. This deprives the Bill of Rights of its true potential as a major instrument of ensuring a rapid, orderly, and irreversible elimination of the great inequalities and injustices left behind by apartheid.

Without a constitutionally structured program of deep and extensive affirmative action, a Bill of Rights in South Africa is meaningless. Affirmative action by its nature involves the disturbance of inherited rights. It is redistributory rather than conservative in character. It is not a brake on change but rather a regulator of change, designed on the one hand to guarantee that change takes place, and on the other hand that it proceeds in an orderly way according to established criteria. Affirmative action enables all the interested parties to make an appropriate contribution, or at least to know where they stand. It presupposes the concertation of diverse forces in an agreed direction, with the State playing an ultimately decisive though not necessarily exclusive role in the process. A Bill of Rights cannot accordingly, be seen in the eighteenth century way simply as a fetter on the state in relation to the citizen (though it should never lose its character as a guarantee against abuse of citizens' rights by the state). On the contrary, through giving constitutional backing to affirmative action, it gives to the state, as well as other forces, a duty to use national institutions and resources to promote the rights of the citizens.

In the historical conditions of South Africa, affirmative action is not merely the corrector of certain perceived structural injustices. It becomes the major instrument in the transitional period after a democratic government has been installed for converting a racist oppressive society into a democratic and just one. It is the instrument in terms of which agreed national and constitutionally established goals are realized in a fundamental way, attributing appropriate responsibilities to all social forces—the public sector, the private sector, and the individual citizen.

E. Misconceptions amongst the Mass of the People about a Bill of Rights

The way in which a Bill of Rights has been projected in South Africa as a means of preserving vested interests and of blocking affirmative action to bring about genuine equality, has given the whole concept a bad name amongst the mass of people. This is most unfortunate. A Bill of

Rights as such is neither a reactionary nor a progressive document. Everything depends on the context.

The fact is that there is a true and progressive concept of a Bill of Rights that merits the support rather than the suspicion of all genuine anti-apartheid fighters. This progressive concept situates such a document in its classic context as a true consolidator of the gains of people in struggle. Those of us engaged in the anti-apartheid fight also have our decisions to make. Either we leave the question of a Bill of Rights to others and then criticize the results, or we enter the fray directly and say "these are our positions, this is where we stand, this is what a Bill of Rights should really be like." More concretely, we can transfer the debate from the remote arenas of the think tanks and locate it where it belongs—in the midst of the life and strivings of the people. Justice and human rights do matter to us. This is what we are fighting for and there should be no cynicism in our hearts on the matter.

In South Africa we already in fact have a document that embodies the key elements of a Bill of Rights. It is a document that was born out of struggle, responds directly to South African conditions, expresses the aspirations of the oppressed people, and meets with internationally accepted criteria of a human rights programme—namely, the Freedom Charter adopted at the Congress of the People in 1955.

From a human rights point of view, the Freedom Charter was amongst the most advanced documents of its time. In clear and coherent language, it spells out social and economic rights that were only to become internationally agreed upon in the 1960s, and people's rights that were only to be formulated in the 1970s and 1980s. The Freedom Charter is accordingly a contribution towards world human rights literature of which we South Africans can accordingly be proud.

IV. A BILL OF RIGHTS FOR A POST-APARTHEID SOUTH AFRICA: SOME PRE-CONDITIONS

A Bill of Rights can either be an enduring product of history shaped by lawyers, or a transitory product of lawyers imposed upon history. If in South Africa it is to be the former and not the latter there will have to be—it is suggested—four basic pre-conditions.

A. An Appropriate Process Whereby a Bill of Rights May Be Adopted

Bills of Rights can be either copied, defined, negotiated or constructed.

1. Copying a Bill of Rights

The easiest and least rewarding procedure is simply to *copy* a Bill of Rights from a model regarded as working well in another country. Apart from the fact that this saves on legal drafting fees, there is little that can be said in its favor. An effective Bill of Rights in any country must relate to the culture, traditions, and institutions of that country, and, above all, correspond to the specific and felt demands of the people at the historic moment when the Bill of Rights is considered necessary. This is not to deny an educative and exemplary role for a Bill of Rights, nor to refuse it a capacity to take on new meanings in the course of time. But it is to insist that an effective Bill comes from inside the historical process, not outside, and that it reflects a set of values gained in the course of struggle and rooted in the consciousness of the people, not one imported from other contexts.

2. Defining a Bill of Rights

Defining a Bill of Rights has the advantage of being directed towards the specific problems of a specific situation. This is what the burgeoning think tank movement on Southern Africa aims to do: select experts who define their way into the problem and define their way out again. The flaw of this approach is that it presupposes that the basic issue is an intellectual one: if only the correct formula can be found, everyone will come to their senses, apartheid will disappear, and all will end well. The fact is that the basic problems are ones of power and consciousness, not of formulation. It is not chauvinistic to assert that there is no lack of brains in South Africa. Even the defenders of apartheid, unfortunately, have an intelligentsia of considerable brainpower, today armed with all the intellectual apparatus of what is called contemporary political science. The fact is that until the social reality and especially the power structure has changed, the intellectual reality will remain imprisoned. The context will be that of rearrangement rather than substitution. Yet, try as the think tankers might, there is no way in which apartheid can be adapted or modified to make it consistent with any meaningful Bill of Rights. Similarly, there is no way in which a Bill of Rights that obeys international standards would be adapted to be consistent with apartheid, however rearranged. Any constitutional scheme designed to entrench the rights of the white minority, whether property rights or rights to racially exclusive education or residential areas, violates the principles of equal dignity and equal opportunity which lies at the heart of any Bill of Rights. Unfortunately, most of the think tanks

seem to have set themselves just such an agenda, namely, to propose a constitutional scheme which, under the guise of a Bill of Rights, would guarantee that however many blacks would be in Parliament, none of the privileges presently enjoyed by the whites would be touched.

3. Negotiating a Bill of Rights

Negotiating a Bill of Rights, the third method, has two great virtues. It operates from inside the process, and by definition, its outcome will correspond to the power realities of the moment, giving it a fair chance of becoming operational. But it has certain serious drawbacks. As in the case of a copied or defined Bill of Rights, the people who are to be the holders of the rights are regarded as mere spectators in the process. Furthermore, the negotiations inevitably result in a document so full of compromises and short-life arrangements that it hardly constitutes a true Bill of Rights. The fact is that one cannot negotiate goals. One has to establish them. What one can negotiate is the means whereby agreed goals can be achieved. If there is no agreement on goals, save at the level of banalities (such as that everyone shall be happy and none shall feel oppressed) then there is no basis for negotiating a Bill of Rights. In the case of South Africa, it is only when the fundamental goal of a non-racial, democratic and united South Africa is accepted, that a suitable foundation could exist for negotiating the terms of a Bill of Rights. What could be negotiated then would be the precise configurations, both substantive and institutional, as well as the exact steps to be taken to get there in as speedy and orderly way as possible.

Even granted agreement on goals, however, the major weakness remaining is the passivity of the people at large in relation to their fundamental rights. We live in an age in which every form of communication with and involvement of the people is possible. Even in the difficult circumstances of apartheid South Africa in the 1950s, the meetings that preceded the Congress of the People at which the Freedom Charter was adopted involved hundreds of thousands and possibly millions of people. All the participants felt thereafter that in some way or another the document was theirs, made by them, for them, and for all the people of South Africa, something for which people were willing to fight, and, as Nelson Mandela said, something for which if needs be, they were willing to die.

4. Constructing a Bill of Rights

In my view, this is what Bills of Rights are or should really be about. This is also what makes the fourth procedure for adopting a Bill of Rights for South Africa imperative—namely, *constructing* such a Bill. A

constructed Bill of Rights will, of course, copy from other models. It should eventually be a coherent and well-defined document drawing on the advice and experience of all the thinkers—whether in tanks or outside—of the world. It will also involve important elements of negotiation. But in addition it will have the characteristics of:

- (i) being built up over a period of time rather than drafted at one moment;
- (ii) being constructed in sections and layers rather than as a single, unique document; and
- (iii) being the product of active involvement of the widest strata of the population at all important times.

These three characteristics are interrelated. The time-frame gives the people as a whole and all interest groups a chance to be involved. A Bill of Rights is built up, stage by stage, starting from agreement on general principles, and moving to specific institutional arrangements. In the meanwhile, all the major social forces that accept the basic goals are specially though not exclusively involved in the evolution of sections that have particular relevance for them. Thus, we already have in South Africa an Education Charter in draft, emerging in the course of struggle against racist education. One could contemplate a Worker's Charter in which trade unions would have a special role. Another example is a Charter on Religious Freedom and the role of the churches, mosques, synagogues, and temples in promoting the goals of the new society. The embryos of important sections of a future Bill of Rights are thus already emerging in the work of the National Education Crisis Campaign, the programmes of the Congress of South African Trade Unions (COSATU) and the South African Congress of Trade Unions (SACTU), the Trade Union bodies, the declarations of activist religious leaders, programmes of the women's organizations, and so on. At a future stage, when a democratic government has been formed or is imminent, the process of consultation and involvement could be extended and formalized. The Freedom Charter itself is, of course, the fundamental document already in existence. On its foundation, a Bill of Rights could be gradually constructed, drawing upon all the inputs of all the different sectors.

In the same way as a constructed Bill of Rights presupposes a building up of the substantive part of the Bill, so it takes account of the need to involve, step by step, the institutions which are to be invoked to make the Bill operative.

Clearly it would be presumptuous to attempt to lay down or even predict the exact course whereby future constitutional documents will be adopted. But the perspective that needs at least to be considered is that

of constitution-making as a process rather than an event. Once this is done, the possibilities become greatly enlarged of involving the people directly in the shaping and formulation of the rights of which they are to be holders. Rights in the true sense of the word are never conferred—they are seized, shaped, expressed, and lived by their bearers. In this way, the social contract ceases to be an abstraction and becomes a reality. The sovereignty of the people takes on a real and not purely notional meaning.

B. In Terms of its Content, the Bill of Rights Must Be Associated with the Extension Rather than the Restriction of Democracy in South Africa

To project a Bill of Rights as being essentially a mechanism to frustrate majority rule is to doom it from the start. The fundamental argument of this paper is that a Bill of Rights should precisely be used to enlarge rather than freeze the area of human rights, and to eliminate rather than perpetuate racial distinctions and the fruits of discrimination.

What needs to be done is to turn the Bill of Rights concept from that of a negative, blocking instrument, which would have the effect of perpetuating the divisions and inequalities of apartheid society, into that of a positive, creative mechanism which would encourage orderly, progressive, and rapid change.

At the level of content, this would take into account specific features of the South African situation. Thus, while providing for general civil and political rights, including a multi-party system based on freedom of speech, association, and organization, in a word, political pluralism, there would be no freedom to call for the maintenance or restoration of apartheid. If the majority of countries in the world have in one way or another outlawed the preaching or practice of apartheid, it would be rather ironical for South Africa, where the policy has caused so much misery and death, to be one of the few exceptions. At another level, any entrenchment of property rights has to take account of the fact that a reality has been constructed in terms of which eighty-seven percent of the land and probably ninety-five percent of productive capacity is in the hands of the white minority. What is required is a constitutional duty to alter these percentages, not one to preserve them.

In relation to Second Generation socio-economic rights, attention needs to be given to breaking out of the confines of the Anglo-Saxon legal tradition whereby basically rights are restricted to what is justiciable, that is, to interests that can be protected by recourse to a court of law. While the role of the courts should always be important, it should be

complemented by a richer concept in terms of which the Bill of Rights not only operates to defend individual rights, but seeks to guarantee the extension of rights to the community as a whole. To take one example, what would be more important: the right to sue your doctor or the right to health? The former, litigation-oriented right might have significant justification in other countries. However, in South Africa what is urgently needed is the imposition of a duty on the State and the private sector to ensure that conditions are created for improving the people's health.

Consideration thus needs to be given to a Bill of Rights as a program and not simply as a set of justiciable interests. A constitutional document that is partly programmatic in character presupposes that certain major social goals are set out in the document. Public and private entities are placed under a legal duty to work toward their realization. The Second Generation of Rights lend themselves more to treatment of this kind than to the justiciable First Generation kind.

Third Generation Rights, such as the right to peace, development, and a clean environment also necessarily have a strong programmatic character which might be upsetting to lawyers habituated to Anglo-American legal conventions. The argument that such concepts are political rather than legal makes increasingly less sense in relation to the changes required in a post-apartheid society. The law has to recognize its political functions and politics have to be structured by law. The object is not to separate the two, but to find the right relation between them.

C. The Bill of Rights Must Be Centered around Affirmative Action

The third fundamental feature of a meaningful Bill of Rights for South Africa is that it be structured around a programme of affirmative action. It is not just individuals who will be looking to the Bill of Rights as a means of enlarging their freedom and improving the quality of their lives, but whole communities, especially those whose rights have been systematically and relentlessly denied by the apartheid system. If a Bill of Rights is seen as a truly creative document that requires and facilitates the achievement of the rights so long denied to the great majority of people, it must have an appropriate affirmative strategy. To adapt Anatole France, if the law in its majesty were to give equal protection to a family of ten living in a two-roomed shanty and a family of two in a ten-roomed mansion, it would not be enlarging the area of human freedom in South Africa. Whatever attitude is taken to unused or under-used accommodations, the failure to impose a legal duty on the State and

the private sector to reduce inequality in living conditions would be to deprive the Bill of true meaning in at least one important area.

The advantage of affirmative action is that clear and irreversible goals with an undeniable social and moral purpose are stated. However, considerable flexibility is permitted in terms of how the goals are to be realised. This helps avoid the dangers of backsliding on the one hand, and producing grandiose but highly voluntaristic and unrealizable plans on the other. If the private sector is to play a positive role in reducing inequality in a democratic South Africa, it is difficult to see how any strategy other than that of massive affirmative action could function.

The example of housing has been given. But just as there is no area of South African life that apartheid has left untouched, so it will be necessary to extend affirmative action to every aspect of South African society—health, education, work, leisure, to mention but a few. The transformations will have to affect not just the social and economic life of the population, but the very institutions of government. Even with the best will in the world, structures themselves built on inequality and injustice cannot be expected to be the guardians of justice and equality for others. In the presence of one of the worst wills in the world, the need to apply affirmative action to the civil service and the organs of state power becomes even more urgent.

D. The Mechanisms for Applying the Bill of Rights Must Be Broadly Based, and Not Restricted to a Small Class of Judges Defending the Interests of a Small Part of the Population.

The assumption in most current writing on a Bill of Rights is that its final watchdog should be a body of highly trained and elderly judges, applying traditional legal wisdom in what is considered a neutral and unbudgeable manner. If the objective is to guarantee the minimum disturbance of existing property and social “rights” (one has to put the word in inverted commas—the power to ensure that your child goes to a whites-only school cannot be dignified by the word “rights”), then who better to fulfill the role than those who not only belong to and share the values of the very group to be protected, but whose whole professional mode has been shaped in the context of the interests and values of that group? If, on the other hand, the dog is to watch the interests of the formerly oppressed, it would have to have a totally different pedigree and training. The question of whether the word “and” in a particular context only means “and” or can also mean “or,” which has exercised the minds of lawyers for generations, would have little interest for defenders of the

rights of the oppressed, who would look overwhelmingly to social rather than semantic factors in making their decisions.

This raises the important and delicate question of the relationship of a Bill of Rights to the legislative power of Parliament. It has already been argued that the objective of a Bill of Rights should be to reinforce rather than restrict democracy. In South African conditions, it is unthinkable that the power to control the process of affirmative action should be left to those who are basically hostile to it. In later years, when the foundations of a stable new nation will have been laid and when its institutions will have gained habitual acceptance, it might be possible to conceive of a new-phase Bill of Rights interpreted and applied by a "mountain-top" judiciary. At present, the great need will be to give people confidence in Parliament and representative institutions, to make them feel that their vote really counts and that Parliamentary democracy serves their interests.

The kind of body that might provide a bridge between popular sovereignty on the one hand, and the application of highly qualified professional and technical criteria on the other, would be one similar to the Public Service Commission. A carefully chosen Public Service Commission with a wide brief, highly technical competence and general answerability to Parliament, could well be the body to supervise affirmative action in the public service itself. Similarly, a Social and Economic Rights Commission could supervise the application of affirmative action to areas of social and economic life. Finally, an Army and Security Commission could ensure that the army, police force, and prison service were rapidly transformed so as to make them democratic in composition and functioning, perhaps the hardest and most necessary of all the tasks facing those who wish to end apartheid in South Africa. Standing in the background, the court, now representative of the population as a whole, would be there to ensure that individual rights were fully respected and affirmative action procedures followed in a constitutional way.

To sum up: the oppressed and all true democrats in South Africa have a great interest in promoting a Bill of Rights for the country and seeing it as a welcome and progressive phenomenon. But such a Bill of Rights has to be created over a period of time with the active involvement of the people. It has to be located in the heart of the democratic process and not be seen as a foreign object imposed upon it. It also must be structured around a strategy of affirmative action. Finally, its implementation has to be entrusted to institutions that are democratic in their composition, functioning, and perspective, and that operate in a mani-

festly fair way under the overall supervision of the people's representatives in Parliament.

Such a Bill of Rights, born out of the struggle for freedom, would live for decades, perhaps centuries, and enrich the international human rights' patrimony, rather than impoverish it.

V. THE QUESTION OF MAJORITIES AND MINORITIES

Apartheid has the capacity of turning the banal into the marvelous. The principle of equal rights, which in other countries is regarded as so ordinary as not to merit any explanation or require any defence, is projected as something quite wondrous in South Africa, indeed so astonishing as to be constitutionally illusory and practically unattainable. Yet essentially this is what the anti-apartheid struggle is directed towards: the achievement of full equality between all South Africans, independent of race, colour, ethnic origin, sex or creed. The measure of the success of any new constitutional order will thus be the degree to which it enshrines the principle of full, genuine, and ineradicable equal rights.

Equal rights means equal rights for each and every individual South African. As far as the basics of citizenship are concerned there will be no distinction whatsoever between persons on the grounds of race or ethnicity. Just as race classification and group areas will disappear from legislation, so they will vanish from citizenship and the electoral system. There will be a common voter's roll, made up of all adult South Africans, to elect a Parliament, representative of and speaking in the name of the whole nation. In this sense, the constitution will be completely colour-blind and totally race-free. There will be no special privileges for racial or ethnic groups, no vetoes, no areas of special competence or "own affairs." Race will only enter the constitution as a negative principle, that is, to the extent that the constitution is not only non-racial but anti-racist. The anti-racist character will be guaranteed by provisions, expressly referring to race, which:

- (i) outlaw racial discrimination;
- (ii) prevent the dissemination of racist ideas and the organisation of racist parties; and
- (iii) ensure that measures are taken to overcome the effects of past racial discrimination.

The question is raised as to what guarantees would exist in such a constitutional order, especially one based on majority rule, against persecution of minorities by the majority. It may be said that, even recogniz-

ing the evils of apartheid, it would be unjust to inflict on future generations of whites the very kinds of discrimination that their fathers have been and are inflicting on the blacks. At the more pragmatic level it may be contended that if one wishes to persuade the whites to relinquish power now, they must be given reasonable guarantees against persecution in the future.

In fact the general scheme outlined above does presuppose guarantees against the persecution both of individuals and of groups, but accomplishes this without introducing racist concepts such as group vetoes, "own affairs" or separate voter's rolls. Three levels of constitutional devices may be distinguished, each different in character but all having the objective of preventing arbitrary or unjust treatment or harassment of any kind on the basis of race, appearance or ethnic origin. These devices supplement the general rights of citizenship and complement each other.

In the first place there will be a Bill of Rights which entrenches basic individual rights for all citizens. Any individual discriminated against on the grounds of belonging to any minority (or majority) group, will have appropriate legal recourse. This is the *guarantee of equal individual rights*.

Secondly, there will be a general nondiscrimination provision which will outlaw any discrimination against any group, as a group, on the grounds of race, colour or ethnicity. Any member of a group discriminated against, would have a legal remedy even if he or she is not directly affected by the discrimination. This is the *guarantee against discrimination*.

Thirdly, the cultural diversity of the country will get a degree of constitutional recognition so as to permit groups to develop certain aspects of what they might call their own way of life with a view to enriching society as a whole. This is the *guarantee of equal rights for all national groups*. Here it is necessary to separate out from a group's "way of life" what are presently objectionable features that require abolition, what are really universally or widely accepted modes of behavior not restricted to that group, and what are intimate characteristics that justify protection and even promotion.

The right to behave as a member of a master race, to insult blacks, and to use violence gratuitously, for example, might be regarded as a marked feature of the way of life of a certain group today. Clearly these would be denounced in any new democratic constitution.

Similarly, there are many social habits which in reality belong to or are open to all people, such as matters of dress, cuisine, and etiquette. One does not need a constitutional right to eat curry or have a braai.

(barbecue) or wear trousers. What will be guaranteed will be the inviolability of the home, freedom to pursue family life, and general freedom of personality. None of these freedoms attach to a particular racial or ethnic group. Next, there are certain activities that historically and culturally have become associated with certain groups, usually based on linguistic association. Thus there are communities historically created with a distinctive socio-cultural personality possessing considerable subjective significance for its members and which contributes towards the general overall texture of South African life. Shorn of their association with oppressive domination, these socio-cultural features will continue and even have a measure of constitutional protection and support. What will not be permitted is the basing of political rights on socio-cultural formations, nor attempts to restore apartheid by political mobilization based on setting group against group. Thus, from a general juridical and citizenship point of view, the whites as whites will disappear from South Africa, as will the blacks. There will only be South Africans. But within the framework of an equal and undivided citizenship, there will be full recognition of linguistic diversity. That is, there will be one South African citizenship with a single suffrage, but many South African languages. There will be extensive recognition of the right to constitute religious organisations, many of which may have their holy literature in a particular language. Thus Afrikaans-speakers who feel comfortable worshipping in the Dutch Reformed Church will be able to continue their prayers and hymns in the way to which they are accustomed, as well as to choose their spiritual leaders, and to develop their doctrine according to the internal teachings of the Church. In this sense there will be unfettered freedom of religious-cultural association (one can think of many other groups—Jews, Cape Moslems, Hindus, Greek Orthodox, as well as the many African independent sects that might have a similar basis). What would not be permitted would be to deny membership on grounds of race etc. Nor would these socio-religious organisations be allowed to function as a cover for political mobilisation on a divisive, racist or ethnic basis. One hopes, in fact, that the religious organisations will play an active role in helping to build a united South Africa and to overcome the inequalities and divisions left behind by apartheid. Without their involvement, the task will be difficult indeed.

Another sector where the constitution could manifest a special tolerance could be in relation to certain areas of traditional law and custom. This is a question where extensive discussion with the people is required. All that is rich and meaningful to people can be retained and progressively developed; while that which is divisive, exploitative, and out of

keeping with the times—especially that which has been distorted by colonialism and apartheid—can be eliminated.

Finally, it should be mentioned that there will be other constitutionally-protected group rights that by their nature will necessarily cut across linguistic and ethnic divides. Thus the workers of South Africa, who today are playing a key role in the fight to destroy apartheid and build a new South Africa, will receive extensive constitutional recognition in the form of both individual and collective rights. Similarly, South African women, also in active combat, who have been the victims of special social and legal disabilities, should have the right not only to be free from discrimination but to call upon special resources so as to overcome the legacy of past discrimination. Other groups that could merit special constitutional recognition might be children, the aged, handicapped persons, and victims of apartheid persecution. In none of these cases would the question of race or ethnicity enter.

The above considerations could perhaps be best understood if applied to a concrete situation. For the purpose of making a clear projection into the future, it is proposed to imagine how the adoption of a democratic constitution could affect two prototypical persons—an Afrikaner businessman and an African peasant—and then to see what significance the constitution would have on the relationship between the two. Simply to say that both will enjoy equal rights is not enough. At present, their relationship is one of profound inequality. The question arises as to how the constitution would promote real and not simply formal equality between them. Furthermore, it is necessary to reflect on the cultural-linguistic dimension, which, while disappearing as a basis for the exercise of political rights, nevertheless continues to be relevant in relation to cultural and national rights.

Looking first at the position of the *Afrikaner businessman* in relation to the new constitutional order we see that:

(i) As a citizen he will enjoy all these civil and political rights which he presently exercises in his privileged capacity as a member of the dominant racial minority, but will do so on the new basis of being an equal citizen, exercising normal constitutional rights, in a non-racial democratic South Africa. Thus, he will have the right to elect and be elected, to join the political party of his choice, and to criticise or defend the government. He will also have the right not to be deprived of his liberty except in terms of the law and after a fair trial. He will enjoy freedom of speech and information, but will not continue to have the right to propagate division and hatred on grounds of race;

(ii) With regard to personal rights, he will have security in his

home, the right to live a family life if he so chooses, the right to enjoy his hobbies and pastimes, the right to move freely around the country, the right to have his holidays, and the right to visit other countries;

(iii) As a businessman he will continue to have the right to exercise his professional and entrepreneurial skills and to be appropriately remunerated therefore. His rights to personal property (a home, a motor car, a bank deposit, etc.) will be protected, while his rights to productive property will be recognized but subjected to the principle of public interest and affirmative action;

(iv) As an Afrikaner, he will have a guaranteed right to use and develop his language and to belong to the Dutch Reformed Church (non-segregated) or to any other religious body of his choice. If he wishes as part of his private life to mix with and marry only Afrikaners, that will be his choice. Similarly, there will be no interference with the habits and customs of daily life, most of which will in fact be practiced by many non-Afrikaners. What he will have to learn to live with, however, is that in relation to anything outside the immediate private or family sphere, there will be constitutional norms of non-discrimination. Thus there will certainly continue to be schools and universities in which Afrikaans is the medium of instruction and in which special attention is given to the study, development, and enrichment of the Afrikaans language and literature. But these schools would not be able to restrict their entry on the basis of race; and

(v) Similarly, Afrikaners might continue to occupy certain neighborhoods as a matter of social practice. What they would not be able to do would be to create racially exclusive areas to which non-Afrikaners or non-whites were not admitted. The new constitution thus would not only automatically declare null and repeal such divisive legislation as the Group Areas Act, but would also prohibit the use of restrictive covenants or the formation of racially exclusive condominiums as a means of continuing apartheid, this time in a privatized form.

Looking next at the position of the *African peasant*, we find that;

(i) For the first time he will be able to enjoy full and normal rights of citizenship, especially those of suffrage in the land of his birth. He will no longer be subject to arbitrary arrest, removal or banishment. All the apartheid laws which presently dominate his life will be annulled;

(ii) As a person, he will for the first time be free to move and reside anywhere in the country. His home will be inviolate, His dignity as a person and his right to a stable family life will receive full constitutional protection;

(iii) As a farmer he will have a claim on the state for access to land and technical, educational, and financial support. As a property owner, what possessions he has will be protected. His house will be safe from the bulldozers; his plot of land and livestock guaranteed against confiscation. He will have a claim on the state to assist him to build, buy or rent a decent home and to enable him to acquire an interest in land for farming that will be legally protected;

(iv) As an African he will for the first time enjoy equal rights with all his fellow South Africans and be free from any discrimination or deprivation. His language will be recognized as one of the national languages of the country. His culture and the history of his forebears will also be respected. Place names, national monuments, and national holidays will record the struggle of his and previous generations. As a victim of past discrimination and domination, he will have a claim on the state for invoking the procedures of affirmative corrective action.

The above analyses have proceeded on the basis that the personalities are male. If they are female, an extra constitutional element will enter, namely the Equal Rights clause, which will bar any discrimination on the grounds of sex. In addition, women will have an affirmative action claim to remove disabilities or disadvantages associated with past discrimination. Women will also have constitutionally recognised benefits in relation to maternity and to child care.

Carrying the constitutional projection one step forward, and positing that the African peasant is a tenant farmer on land owned by the Afrikaner businessman, what bearing would the future constitution, and specially the Bill of Rights, have on their relationship? In broad terms, the constitution will require that the immense injustice, whereby eighty-seven percent of the lands belongs to a fifteen percent minority, be corrected as rapidly as possible. Exactly how this will be achieved and how this will affect the specific relationship between the businessman and the farmer, will be conditioned by two factors, one historical and the other institutional.

The historical factor relates principally to the behavior of the businessman. If he and his class prefer to fight to the death, if they threaten to destroy and massacre the workers as a protest against the installation of a democratic government, then they should not be surprised if appropriate countermeasures, including confiscation of land and goods, are taken. If on the other hand they accept a new patriotism, adhere to the new constitution, and continue to use their productive skills for the growing of food and for the benefit of the country as a whole, the process of land redistribution will necessarily have a less drastic character. Af-

firmative action presupposes orderly, significant, and irreversible progress to eliminate the inequalities produced by centuries of colonialism and apartheid. As has been stated, constitutionally determined criteria are used to establish clear goals. Then the parties most directly interested negotiate the means whereby these goals can effectively be achieved. If disputes arise on the modalities of change, appropriate conflict resolution machinery exists.

In the case of land, it is of course not the soil itself that is redistributed, but title to or interests in it. Here the possible legal forms are infinite, ranging from state confiscation at the one end, to outright state purchase, to joint ventures with the state (or local public authorities), to cooperatives, to non-racial private or public companies or corporations, to partnerships, to parcelling off the land to individual farmers. Regional particularities and the existence of otherwise abandoned or unused land will be relevant, as will be to a considerable extent the economic importance to the country of maintaining high levels of food production. Similarly, the time needed for new owners, shareholders, partners or cooperative members to acquire appropriate technical and management skills will enter the picture. Legally enforceable, phased arrangements could be worked out. The particular wish and family situations of the interested persons could also be taken into account.

What is certain is that the present deformed and unjust relationship between the Afrikaner businessman and the African farm-tenant, structured on legally protected arrogance and domination, will come to an end. Equal citizenship will not just be a formal measure. It will have concrete content, enabling each and every person whatever his or her background, to act as a free person and to enjoy the benefits of freedom, in the land of his or her birth.

V. CONCLUSION: TRANSITIONAL ARRANGEMENTS

The only value of predictions about the future is that they enable their makers later to determine how far from the mark they originally were. In the case of South Africa, a tense battle is underway, and although the eventual defeat of the forces of apartheid can be predicted with certainty, the precise time that this will take and the nature of the intermediate or transitional phases are still quite open.

Thus, if apartheid is destroyed by insurrection and a revolutionary seizure of power, the correlation of forces will be such that the classes of society represented by the victorious revolutionaries can impose their terms on society as a whole. A constitution is necessary to institutional-

ize the new power, not to bring it into being. It will include a Bill of Rights, but the procedures of affirmative action to ensure the restoration of land, wealth, and dignity to the people would inevitably be far less cumbersome and protracted than those contemplated here.

On the other hand, the increasingly precarious base of the apartheid regime inside South Africa and its growing isolation internationally, could lead it to go along with attempts to bring about a managed solution on the lines of the Lancaster House Agreement arrived at in relation to Zimbabwe. That is, there could be an attempt to negotiate a constitution and a Bill of Rights along lines that have been criticised above, because they keep racist principles alive and guarantee privileges, not rights, for the whites. The position of the anti-apartheid forces has long been that the making of a constitution for a democratic South Africa belongs to the people as a whole, acting through a democratically elected Constituent of National Assembly. What should be negotiated is not a constitution, but the transitional arrangements leading up to the making of a Constitution. By their nature, such arrangements—which might or might not include political and legal guarantees of a firm though transitory kind—will fall short of the democratic ideal. For their reduced life span, they could well include certain features that still bore lingering imprints of apartheid society. Such transitional arrangements must, however, be distinguished from attempts to create a so-called internal settlements like the Zimbabwe-Rhodesia setup of Bishop Muzorewa and the Turnhalle Agreement in Namibia. In the first place, such internal settlements are arrived at by means of an alliance between the apartheid rulers and a black collaborator class. Since the majority of the people are excluded from the agreements, nothing is settled, the war continues and the only difference is that blacks play a bigger role in the oppression of their fellow blacks. Furthermore, internal settlements are meant to be permanent, whereas transitional arrangements are intended to be self-eliminating. In short, internal settlements are a means of postponing democracy, while transitional arrangements are a means of hastening it.

The negotiation of transitional arrangements could in fact pave the way for a relatively peaceful dismantling of the structures of apartheid and the establishment of a democratic South African state. The goal of a race-free society would not be negotiable, but the means of getting there, and in particular, the time table and method of transferring power from a racial minority to the people as a whole, would be.

In this context, it becomes more important than ever that opponents of apartheid the world over keep their eyes fixed on the goal of genuine democracy in South Africa. To suspend sanctions because apartheid

managed to don attractive new clothes would be to betray generations of South Africans who have struggled to liberate their country from racial oppression and exploitation. It would also be to postpone the peace which our country so sorely needs, and delay the reconstruction necessary to ensure that South Africa truly becomes a country that belongs to all who live in it and a proud member of the community of nations.

APPENDIX A

THE FREEDOM CHARTER

Adopted at Kliptown, Transvaal, 26 June 1955.¹

We, the People of South Africa, declare for all our country and the world to know:

that South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of all the people;

that our people have been robbed of their birthright to land, liberty and peace by a form of government founded on injustice and inequality;

that our country will never be prosperous or free until all our people live in brotherhood, enjoying equal rights and opportunities;

that only a democratic state, based on the will of all the people, can secure to all their birthright without distinction of colour, race, sex or belief;

And therefore, we, the people of South Africa, black and white together—equals, countrymen and brothers—adopt this Freedom Charter. And we pledge ourselves to strive together, sparing neither strength nor courage until the democratic changes here set out have been won.

The people shall govern!

Every man and woman shall have the right to vote for and to stand as a candidate for all bodies which make laws; .

All people shall be entitled to take part in the administration of the country;

The rights of people shall be the same, regardless of race, colour or sex;

All bodies of minority rule, advisory boards, councils and authorities shall be replaced by democratic organs of self-government.

All national groups shall have equal rights!

There shall be equal status in the bodies of state, in the courts and in the schools for all national groups and races;

All people shall have equal right to use their own languages, and to develop their own folk culture and customs;

All national groups shall be protected by law against insults to their race and national pride;

1. Drawn up in 1955 by a unique grassroots campaign and ratified by the most representative gathering in the history of South Africa, the Freedom Charter has been adopted by the ANC until democratic institutions are established in a future democratic South Africa.

The preaching and practice of national, race, or colour discrimination and contempt shall be a punishable crime;
All apartheid laws and practices shall be set aside.

The people shall share in the country's wealth!

The national wealth of our country, the heritage of all South Africans, shall be restored to the people;

The mineral wealth beneath the soil, the banks and monopoly industry shall be transferred to the ownership of the people as a whole;

All other industry and trade shall be controlled to assist the well-being of the people;

All people shall have equal rights to trade where they choose, to manufacture and to enter all trades, crafts and professions.

The land shall be shared among those who work it!

Restrictions of land ownership on a racial basis shall be ended, and all the land redivided amongst those who work it, to banish famine and land hunger;

The state shall help the peasants with implements, seed, tractors and dams to save the soil and assist the tillers;

Freedom of movement shall be guaranteed to all who work on the land;

All shall have the right to occupy land wherever they choose;

People shall not be robbed of their cattle, and forced labour and farm prisons shall be abolished.

All shall be equal before the law!

No one shall be imprisoned, deported or restricted without a fair trial;

No one shall be condemned by the order of any Government official;

The courts shall be representative of all the people;

Imprisonment shall be only for serious crimes against the people, and shall aim at re-education, not vengeance;

The police force and army shall be open to all on an equal basis and shall be the helpers and protectors of the people;

All laws which discriminate on grounds of race, colour or belief shall be repealed.

All shall enjoy equal human rights!

The law shall guarantee to all their right to speak, to organise, to meet together, to publish, to preach, to worship and to educate their children;

The privacy of the house from police raids shall be protected by law;

All shall be free to travel without restriction from countryside to town, from province to province, and from South Africa abroad;
Pass Laws, permits and all other laws restricting these freedoms shall be abolished.

There shall be work and security!

All who work shall be free to form trade unions, to elect their officers and to make wage agreements with their employers;
The state shall recognise the right and duty of all to work, and to draw full unemployment benefits;
Men and women of all races shall receive equal pay for equal work;
There shall be a forty-hour work week, a national minimum wage, paid annual leave, and sick leave for all workers, and maternity leave on full pay for all working mothers;
Miners, domestic workers, farm workers and civil servants shall have the same rights as all others who work;
Child labour, compound labour, the tot system and contract labour shall be abolished.

The doors of learning and of culture shall be opened!

The government shall discover, develop and encourage national talent for the enhancement of our cultural life;
All the cultural treasures of mankind shall be open to all, by free exchange of books, ideas and contact with other lands;
The aim of education shall be to teach the youth to love their people and their culture, to honour human brotherhood, liberty and peace;
Education shall be free, compulsory, universal and equal for all children;
Higher education and technical training shall be opened to all by means of state allowances and scholarships awarded on the basis of merit;
Adult illiteracy shall be ended by a mass state education plan;
Teachers shall have all the rights of other citizens;
The colour bar in cultural life, in sport and in education shall be abolished.

There shall be houses, security and comfort!

All people shall have the right to live where they choose, to be decently housed, and to bring up their families in comfort and security;
Unused housing space to be made available to the people;
Rent and prices shall be lowered, food plentiful and no one shall go hungry;
A preventive health scheme shall be run by the state;

Free medical care and hospitalisation shall be provided for all, with special care for mothers and young children;

Slums shall be demolished, and new suburbs built where all have transport, roads, lighting, playing fields, creches and social centres;

The aged, the orphans, the disabled and the sick shall be cared for by the state;

Rest, leisure and recreation shall be the right of all;

Fenced locations and ghettos shall be abolished, and laws which break up families shall be repealed.

There shall be peace and friendship!

South Africa shall be a fully independent state, which respects the rights and sovereignty of all nations;

South Africa shall strive to maintain world peace and the settlement of all international disputes by negotiation—not war;

Peace and friendship amongst all our people shall be secured by upholding the equal rights, opportunities and status of all;

The people of the protectorates—Basutoland, Bechuanaland and Swaziland—shall be free to decide for themselves their own future;

The right of all the peoples of Africa to independence and self-government shall be recognised, and shall be the basis of close co-operation.

Let all who love their people and their country now say, as we say here:
**“THESE FREEDOMS WE WILL FIGHT FOR, SIDE BY SIDE,
THROUGHOUT OUR LIVES, UNTIL WE HAVE WON OUR
LIBERTY.”**

APPENDIX B

CONSTITUTIONAL GUIDELINES FOR A DEMOCRATIC SOUTH AFRICA²

The State

- (A) South Africa shall be an independent, unitary, democratic and non-racial state.
- (B) Sovereignty shall belong to the people as a whole and shall be exercised through one central legislature, executive, judiciary and administration. Provision shall be made for the delegation of the powers of the central authority to subordinate administrative units for purposes of more efficient administration and democratic participation.
- (C) The institution of hereditary rulers and chiefs shall be transformed to serve the interests of the people as a whole in conformity with the democratic principles embodied in the constitution.
- (D) All organs of government, including justice, security, and armed forces, shall be representative of the people as a whole, democratic in their structure and functioning, and dedicated to defending the principles of the constitution.

Franchise

- (E) In the exercise of their sovereignty, the people shall have the right to vote under a system of universal suffrage based on the principle of one person/one vote.
- (F) Every voter shall have the right to stand for election and to be elected to all legislative bodies.

National Identity

- (G) It shall be state policy to promote the growth of a single national identity and loyalty binding on all South Africans. At the same time, the state shall recognise the linguistic and cultural diversity of the people and provide facilities for free linguistic and cultural development.

Bill of Rights and Affirmative Action

- (H) The Constitution shall include a Bill of Rights based on the Freedom Charter. Such a Bill of Rights shall guarantee the fundamental human rights of all citizens, irrespective of race, colour, sex or

2. These principles were developed by the African National Congress and published for discussion in 1988. 4 Weekly Mail 39, Oct. 7-13, 1988, at 7, col.1.

creed, and shall provide appropriate mechanisms for their protection and enforcement.

- (I) The state and all social institutions shall be under constitutional duty to eradicate race discrimination in all its forms.
- (J) The state and all social institutions shall be under a constitutional duty to take active steps to eradicate, speedily, the economic and social inequalities produced by racial discrimination.
- (K) The advocacy or practice of racism, fascism, nazism or the incitement of ethnic or regional exclusiveness or hatred shall be outlawed.
- (L) Subject to clauses (I) and (K) above, the democratic state shall guarantee the basic rights and freedoms, such as freedom of association, thought, worship and the press.

Furthermore, the state shall have the duty to protect the right to work and guarantee the right to education and social security.

- (M) All parties which conform to the provision of (I) and (K) above shall have the legal right to exist and to take part in the political life of the country.

Economy

- (N) The state shall ensure that the entire economy serves the interests and well-being of the entire population.
- (O) The state shall have the right to determine the general context in which economic life takes place and define and limit the rights and obligations attaching to the ownership and use of productive capacity.
- (P) The private sector of the economy shall be obliged to cooperate with the state in realising the objectives of the Freedom Charter in promoting social well-being.
- (Q) The economy shall be a mixed one, with a public sector, a private sector and a small scale family sector.
- (R) Co-operative forms of economic enterprise, village industries and small scale family activities shall be supported by the state.
- (S) The state shall promote the acquisition of management, technical and scientific skills among all sections of the population, especially the blacks.
- (T) Property for personal use and consumption shall be constitutionally protected.

Land

- (U) The state shall devise and implement a land reform programme that will include and address the following issues:

Abolition of all racial restrictions on ownership and use of land.
Implementation of land reform in conformity with the principle of affirmative action, taking into account the status of victims of forced removals.

Workers

- (V) A charter protecting workers' trade union rights, especially the right to strike and collective bargaining, shall be incorporated into the constitution.

Women

- (W) Women shall have equal rights in all spheres of public and private life and the state shall take affirmative action to eliminate inequalities and discrimination between the sexes.

The Family

- (X) The family, parenthood and childrens' rights shall be protected.

International

- (Y) South Africa shall be a non-aligned state committed to the principles of the Charter of the OAU and the Charter of the UN and to the achievement of national liberation, world peace and disarmament.